



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/02835/2018**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at HMCTS Employment Tribunal,
Liverpool
On 17th September 2018**

**Determination
Promulgated
On 21st September 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

**HIU FUNG CHEUNG
(ANONYMITY ORDER NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Salam, of Salam & Co Solicitors

For the Respondent: Mr Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

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The appellant appeals against the decision of Judge of the First-tier Tribunal Garrett dated 6 April 2018 dismissing the appellant's appeal against the decision of the respondent dated 3 January 2018 refusing leave to remain and refusing the appellant's human rights claim. The appellant is a citizen of China, from the Special Administrative Region of Hong Kong. On 7 September 2017 he made an application for indefinite leave to remain based on 10 years long residence under paragraph 276B

of the immigration rules. He had previously resided in the United Kingdom with different periods of leave to remain as a student.

2 The respondent refused the application on the grounds that the appellant had been absent from the United Kingdom for a period of 600 days in the previous 10 years, and therefore his residence was treated as being broken, having spent more than the permitted '540 days' outside the United Kingdom during that period. (In fact, paragraph 276A(a)(v) refers to '18 months', but insofar as 18 months, or 547 days, differs from the 540 days referred to in the decision letter, I do not find that this difference could be considered to be material to the outcome of the appeal and I make no ruling as to whether the respondent refers to the correct period.)

3 The respondent states as follows at page 3 of 6 of the decision letter:

"We have assessed whether there are any particularly compelling circumstances which led to you breaching the absence limit but from the detailed information you have provided there is nothing to suggest you were not in a position to have spent less time out of the UK. Although you were a child attending school in the UK and returning to Hong Kong between terms there was no barrier to you being present in the UK during these periods if there was an intention of you meeting the long residence requirement. Furthermore, with regard to absences of 121 and 98 days respectively in 2011 and 2012, for no other reason than you not having cause to be in the UK, having completed your studies. It is considered that these absences were not due to compelling reasons.

We are not therefore willing to offer you discretion for your excess absences and as such you fail to meet the requirements of part of 276B(i)(a) because you cannot demonstrate 10 years of continuous lawful residence."

4 The appellant had also relied upon his relationship in United Kingdom with his partner, Ms. BR, a British national, with whom he had been in a relationship since 2013. The respondent refused leave to remain on that ground on the basis that he had not provided adequate information regarding his partner and his relationship with her, or about her immigration status, and in any event had not argued that there were insurmountable obstacles to family life continuing outside the UK.

5 The appellant appealed, the appeal coming before the Judge on 21 March 2018. An issue in the appeal was the application of the respondent's Immigration Directorate Instruction on Long residence, Version 15.0, dated 3.4.17. That instruction, set out in more detail below, provides guidance about how an application should be decided if the applicant has been absent from the UK for more than 6 months in one period or more than 18 months in total over 10 years, but where there are compelling or compassionate circumstances.

- 6 Before the Judge, the appellant and BR gave evidence. The judge held that the appellant failed to meet the immigration rules in relation to long residence. Further, although the judge accepted that the couple were in a genuine relationship, he found that the appellant did not come within the immigration rules for family life, and that there were no compelling circumstances which could justify a grant of leave to remain under article 8 ECHR outside of the immigration rules [32], and dismissed the appeal.
- 7 The appellant applied for permission to appeal in grounds dated 20 April 2018 arguing, in summary, that the judge erred in law in:
- (i) failing, when finding that the appellant had not established that there were any compelling or compassionate circumstances in relation to his excess absences from the UK, to give reasons which were adequate in law for such a finding; (Grounds, para 5);
 - (ii) finding that the appellant did not meet the requirements of paragraph 276ADE(1)(v) (18 or above and under 25 years and has spent at least half of his life 'living continuously in the UK'); the appellant's absences had been due to reasons beyond his control (Grounds, para 6);
 - (iii) requiring the appellant to leave the United Kingdom to make an application for entry clearance under Appendix FM, on the grounds that such requirement was 'unjust' (Grounds, para 10);
 - (iv) misdirecting himself in law in assessing whether there were insurmountable obstacles to family life continuing outside the UK, in restricting in his assessment at [30] as to whether the appellant could temporarily leave the UK for the purposes of making an application for entry clearance, whereas Section Ex1(b) requires the consideration of whether there are insurmountable obstacles faced by *the couple* living together outside of the UK (Grounds, para 11);
 - (v) erring in law in his assessment of insurmountable obstacles by failing to take into account that 'due to the partners health problems, documented by her GP (page 63 of the appellant's bundle) she would not be able to cope should the appellant leave the country'.
- 8 Permission to appeal was granted by First-tier Tribunal Judge Beach on a decision dated 14 July 2018.
- 9 I have heard submissions from the parties today.

Discussion

The long residence issue

10 It is appropriate to set out the terms of the relevant IDI:

“If the applicant has been absent from the UK for more than 6 months in one period or more than 18 months in total, the application should normally be refused. However, it may be appropriate to exercise discretion over excess absences in compelling or compassionate circumstances, for example where the applicant was prevented from returning to the UK through unavoidable circumstances.

This must be decided at senior executive officer (SEO) level with a grant of leave outside the Immigration Rules being the appropriate outcome.

Things to consider when assessing if the absence was compelling or compassionate are:

- for all cases – you must consider whether the individual returned to the UK within a reasonable time once they were able to do so
- for the single absence of over 180 days:
 - o you must consider how much of the absence was due to compelling circumstances and whether the applicant returned to the UK as soon as they were able to do so
 - o you must also consider the reasons for the absence
- for overall absences of 540 days in the 10 year period:
 - o you must consider whether the long absence (or absences) that pushed the applicant over the limit happened towards the start or end of the 10 year residence period, and how soon they will be able to meet that requirement
 - o if the absences were towards the start of that period, the person may be able to meet the requirements in the near future, and so could be expected to apply when they meet the requirements
 - o however, if the absences were recent, the person will not qualify for a long time, and so you must consider whether there are particularly compelling circumstances

All of these factors must be considered together when determining whether it is reasonable to exercise discretion.”

- 11 In his application for at page 39, the appellant sets out 14 different absences from United Kingdom. The longest breaks were 121 days from 27 May 2011 to 25 September 2011; 98 days from 8 June 2012 to 14 September 2012; 62 days from 2 July 2009 to 2 September 2009; 61 days from 2 July 2010 until 1 September 2010 and 53 from 4 July 2008 to 26 August 2008. In relation to the absence of 121 days in 2011, the reason for absence on the application form is said to be ‘Completion of six form but had no Uni offers to had to return and continue search for uni’. In relation to the 98 day absence in 2012, the explanations given was ‘Graduation from foundation year and had to obtain a new CAS for visa for new uni.’ Several explanations for absences for other periods

were given as 'End of term boarding house closing'. In relation to 2008, it was stated 'Too young to stay in the UK alone during out of term time'.

- 12 In his decision, the judge set out at [3] the reasons advanced by the respondent in the decision letter of 3 January 2018 for finding no compelling or compassionate circumstances for the appellant's absences, the judge accurately summarising the respondent's case: 'In particular, although the appellant had been a child when attending school in the United Kingdom and returned to Hong Kong between terms, there was no barrier to him being present in the United Kingdom during those periods if the eventual intention was to meet the long residence requirement. The respondent noted that there had been periods of absence of 121 and 98 days respectively in 2011 and 2012 for no reason other than the appellant had completed his studies.'
- 13 The appellant's oral evidence on this issue was set out at [8], and at [19] the judge set out the arguments advanced on the appellant's behalf by Mr Salam: that the appellant's absences arose because he was dependent on his parents and could not afford to stay in United Kingdom whilst trying to find a college, and that by tradition the appellant was tied to his Chinese parents.
- 14 The appellant complains that the judge has not given adequate reasons for finding that the immigration rule on long residence was not satisfied and that there were not compelling or compassionate circumstances such that the excess absences from the UK should be excused, as per the relevant IDI.
- 15 Although the judge's reasoning on this point does not appear to all in one place, the judge appears to make findings on this issue as follows:
- "27 ... I am not satisfied that the respondent's rejection of the appellant's application on long residence basis was wrong.
- ...
- 31 Although I take into consideration that the main application for long residence in this appeal failed because of an excess 60 days, or thereabouts, outside United Kingdom spent by the appellant, that does not, in my view, make this a 'near miss' case nor could any 'near miss' have any relevance to the human rights issue.
- ...
- Similarly, there are no compelling or compassionate circumstances of the kind referred to in Home Office guidance."
- 16 I find that it is clear from the last paragraph of [31] that the judge was aware of the relevant IDI, and was making a finding that the appellant's explanations did not amount to compelling or compassionate circumstances so as to engage the relevant policy. The judge had set out the appellant's case on compelling and compassionate circumstances adequately, earlier in the decision.

- 17 Although it could be said that the judge's actual reasoning as to why the explanations did not amount to compelling or compassionate circumstances was slender, I find that it was adequate in law in all the circumstances of the case. This is because the appellants case in this regard is manifestly weak. The first example stated within the policy as to what amounts to compelling or compassionate circumstances is where an applicant is prevented from returning to the UK through 'unavoidable circumstances'. There is nothing within the appellant's explanations suggesting that he was prevented from returning to the UK at any given time through circumstances which were 'unavoidable'. The guidance also sets out matters to consider when assessing if an absence was compelling or compassionate, and in relation to all cases, the decision maker must consider whether the individual returned to the UK within a reasonable time once they were 'able' to do so.
- 18 I find it is reasonably clear from the terms of the policy that it is intended to assist persons who had *intended* to be present in the United Kingdom, but through circumstances outside of their control, were prevented from re-entering. Examples of unavoidable circumstances which might prevent an individual from being able to return to the UK might be illness of the applicant or possibly a relative, loss of a passport, or natural disaster. The policy cannot properly be interpreted as meaning that a person who for some reason had not yet secured a university place and could therefore not re-enter into the UK to further his studies, could be said to be 'unable' to return to the UK due to 'unavoidable circumstances'. Perhaps if the UCAS computer system crashed for prolonged period, this might engage the policy, but the appellant does not advance any explanation of that sort. The appellant was unable to return to the UK for a period of time in 2011 not because of compelling or compassionate circumstances, but simply because he had not yet secured a university place, and therefore did not yet meet the requirements of the immigration rules for entry clearance.
- 19 Further, even if there were cultural expectations that the appellant, who has been an adult since December 2010, return to visit his parents during summer vacations, this could not properly be said to amount to compelling or compassionate circumstances resulting in the appellant being unable to return to the UK.
- 20 Ultimately, it was clear that the appellant's excessive absences from the UK resulted from his, and his parents ignorance of the requirements of the long residence rules. Such ignorance cannot properly be described as amounting to compelling or compassionate circumstances.
- 21 The appellant's case on compelling and compassionate circumstances was thus so manifestly weak, that the judge's reasoning in finding that there were no compelling or compassionate circumstances was adequate in law.
- 22 The appellant's argument that the judge also failed to have proper regard to the appellant's entitlement to leave to remain on private life grounds

under paragraph 276ADE(1)(v) fails for the same reasons as set out above, because the 'living continuously in the UK' requirement in that paragraphs is, according to the heading of para 276A, and read with 276A(c), also subject to the provision in para 276A(a)(v), that a period of continuous residence is treated as broken if an applicant has spent a total of more than 18 months absent from the United Kingdom during the period in question.

Family life

- 23 I do however find that the judge erred in law in his consideration of the appellant's case under paragraph Ex1(b) of Appendix FM. The terms of Ex1(b) required the consideration of whether there were 'insurmountable obstacles to family life with [BR] continuing outside the UK'. I find that that expression requires consideration of the continuation of family life on an indefinite, not temporary basis, outside of the UK, and Mr Whitwell for the respondent accepts that that is the case.
- 24 The judge considers the existence of insurmountable obstacles at [29] – [31]. It is clear that the judge considers whether a temporary separation between the appellant and his partner would amount to insurmountable obstacles. At [30] the judge refers to the possibility that both parties will be distressed if they were forced to separate, even if that was only for the appellant to return to Hong Kong and make a formal application to return. The judge also refers to the appellant being able to return to live with his parents and that he could be visited by his partner, as she had done in the past. At [31] the judge refers to the fact that the appellant's relationship with his partner can, even if only for the time being, continue by the use of modern methods of communication and visits; and further at [31] the judge states that it may shorten the period of separation if the appellant made a prompt application to return to the UK. The scenarios considered by the judge therefore appear to contemplate the parties being either apart, or with them making a temporary return/visit to Hong Kong. This is not the question that is raised by Ex1(b).
- 25 However, I find that such error is not material to the outcome of the appeal. I find that even if the judge had directed himself in law to consider whether there were insurmountable obstacles to the appellant's family life with his partner continuing outside of the UK on an indefinite basis, he would inevitably have come to the same conclusion, that there were none. This is because there was very little evidence before the judge as to what such insurmountable obstacles might be.
- 26 The appellant complains that the judge erred in law in failing to have adequate regard to a GP letter at page 63 of the appellant's bundle relating to BR. The judge held at [30] that 'There is no medical evidence to suggest that either party suffers from any medical condition which would seriously inhibit such an arrangement' (where 'such an arrangement' is, further to my finding above, to be deemed to represent a temporary separation between the couple). The GP letter, which is undated, provides as follows:

"I write to confirm from our records that this patient has a long history of anxiety. She was first referred to CAHMS in connection with persistent anxiety by a health visitor in 2004 [at which point BR would have been about 8- being born in 1996]. However in March 2005 she was re-referred by a GP because of worsening of her anxiety such that she became almost hysterical if her mother was not in sight. Thereafter there are a number of letters from CAHMS and the child psychology service which I cannot currently access electronically.

It is clear that she was treated with CBT between May 2012 and June 2013 [then aged 16-17] She was re-referred the [sic] that service by a GP in October 2013 as she could not stop worrying about her health.

We have a letter from the specialist community children's service CAHMS West on Area Health Trust from 2014 addressed to [BR] [then aged about 18] confirming that she had been re-referred because of anxiety which by then seems to be related to anxiety about college work which was being which was being exacerbated by the lack of a good routine, with poor eating routine and sleep hygiene. Appropriate advice and information was supplied to [BR].

She was reviewed by her previous GP in August 2016 [age 22] during her first summer holiday from University. She was again experiencing health-related anxiety & it was noted that her father died when she was three weeks old and that she had suffered a number of further bereavements at the age of 12. It was agreed that she would seek help through the student counselling service.

I hope this information will serve to confirm her diagnosis of significant anxiety."

- 27 Although one must have every sympathy for BR and her history of anxiety, the evidence does not support the appellant's proposition as put forward in the grounds of appeal that 'due BR's health problems documented by her GP ... she would not be able to cope should the appellant leave the country'. The appellant himself is not actually mentioned in the letter, and although BR's anxiety as a young child aged 8-9 appeared to relate to anxiety caused by separation from her mother, there is no reference thereafter to separation anxiety. In 2012 and 2013, she was worried about her health; in 2014 she had anxiety about college work; and in 2016 she again had health-related anxiety. The letter does not support the proposition that any of BR's anxiety related problems would be exacerbated by the appellant leaving the United Kingdom temporarily to make an application for entry clearance from abroad, or even both of them moving to live in Hong Kong.
- 28 I find that the judge did not, at [30], fail to take into account the GP letter. The judge does not state that there was no medical evidence

before him, rather that there was no medical evidence to suggest that either party suffered from any medical condition which would seriously inhibit an arrangement involving a temporary separation.

- 29 Even if, contrary to my finding above, the judge did in fact fail to have regard to the GP letter, I find that such failure would have made no material difference to the outcome of the appeal; there was insufficient evidence advanced by the appellant to demonstrate, even taking the GP letter into account, that there would be insurmountable obstacles to family life continuing abroad whether on a temporary or indefinite basis.
- 30 Further, the appellant's suggestion in the grounds of appeal that to require the appellant to leave the country and go through a lengthy and clearance process as a partner was 'unjust', is unparticularised and demonstrates no material error of law. Further, insofar as it is suggested at paragraph 12 of the grounds of appeal that there has been an error of law by a misapplication of the principles in *Chikwamba v SSHD* [2008] UKHL 40, this argument is also unparticularised. The argument, such as it is, appears to be advanced on the basis that 'If it is to be accepted by the Home Office that the applicant could meet all requirements for re-entry in future...' (then a requirement that he leave to make such an application would be disproportionate). The argument is therefore framed on the hypothetical basis that all of the requirements for entry clearance would be met by the appellant. However, they were not. At the time of the hearing before judge, BR had an offer of employment, but had not yet commenced it (see [32]), and ordinarily, an applicant for entry clearance would need to demonstrate six months' worth of payslips to meet the requirements of Appendix FM-SE. There is nothing in the appellant's point here.
- 31 I find that the judge's decision discloses no material law.
- 32 The appellant submitted to this tribunal an application under Rule 15(2A), Tribunal Procedure (Upper Tribunal) Rules 2008 that the tribunal consider a notice under section 120 NIAA 2002, to the effect that at today's date, a recalculation of the 10 year period under paragraph 276B would mean that certain of the appellant's earlier absences from the UK now fell to be disregarded, and over the last 10 years running up to the present time, the appellant had not been absent from the United Kingdom in excess of 540 days. However, as I have found no material error in the judge's decision, this rule 15(2A) notice has no application. If the appellant wishes to make a further application for indefinitely to remain now, based on a different 10 year period, he is free to make such an application.

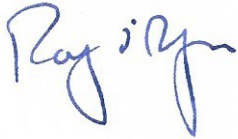
Decision

The judge's decision did not involve the making of any material error of law

The appellant's appeal is dismissed

Signed:

Date: 18.9.18

A handwritten signature in blue ink, appearing to read 'P. O'Ryan', written in a cursive style.

Deputy Upper Tribunal Judge O’Ryan